

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE

2006 SPECIAL 301 REPORT

ISRAEL

EXECUTIVE SUMMARY

Special 301 Recommendation: Israel should remain on the Priority Watch List.

Actions to be Taken in 2006:

- **The Knesset Should Reject Attempts by the Government to Pass Copyright Law Hostile to Right Holders and Which Could Violate Israel's Bilateral Obligations to the U.S.:** IIPA understands the Knesset has passed a first reading of the Copyright Amendment Bill 2005. This Bill significantly weakens protection for right holders in sound recordings, threatening their very livelihoods, and could also result in Israel violating its bilateral obligations and overruling a case decision of 2004 in favor of foreign right holders. The Knesset should send this Bill back to the Executive for reconsideration in light of the many points made in this submission and previous submissions to the Israeli Government. Rather than moving backward on copyright, as this Bill proposes to do, the Israeli Government should move forward, including adequately protecting copyright in the digital age and fully implementing the WCT and WPPT. Other attempts to change the copyright legislation include a proposal to substantially reduce a right holder's ability to decide how and within which structure to exploit their public performance and broadcasting rights, seriously undermining their negotiating position with respect to users of recorded music
- **Fortify Special Police IPR Units:** The Special Police Units function well in Israel, but they require significantly more manpower to be as effective as possible, and should have the authority to take actions *ex officio*. The National Police Unit should have the authority to coordinate districts for more effective and sustained enforcement.
- **Give Copyright Piracy Cases Priority Attention:** Police attorneys and prosecutors should expeditiously handle incoming copyright piracy files, proceed with criminal prosecutions of pirates within shorter periods of time, and ask for substantially higher penalties.

For more details on Israel's Special 301 history, see IIPA's "History" appendix to this filing at <http://www.iipa.com/pdf/2006SPEC301HISTORICALSUMMARY.pdf>. Please also see previous years' reports at <http://www.iipa.com/countryreports.html>.¹

¹ Because of the importance of the legislative issues to IIPA this year, we dispense with providing piracy and enforcement updates. The issues remain similar to those reported in the IIPA 2005 Special 301 report on Israel which can be found at <http://www.iipa.com/rbc/2005/2005SPEC301ISRAEL.pdf>.

ISRAEL
ESTIMATED TRADE LOSSES DUE TO COPYRIGHT PIRACY
(IN MILLIONS OF U.S. DOLLARS)
AND LEVELS OF PIRACY: 2001-2005²

INDUSTRY	2005		2004		2003		2002		2001	
	Loss	Level								
Records & Music	28.0	35%	34.0	40%	40.0	63%	34.0	50%	40.0	25%
Business Software ³	32.9	34%	30.0	33%	35.0	35%	29.9	37%	36.9	40%
Books	1.0	NA								
Motion Pictures ⁴	NA	NA	30.0	40%	30.0	50%	30.0	50%	15.0	50%
Entertainment Software ⁵	NA	95%	12.4	88%	NA	75%	17.2	68%	66.5	89%
TOTALS⁶	61.9+		107.4		106.0		112.1		159.4	

COPYRIGHT AND RELATED LAWS

Copyright in Israel is governed under the Copyright Act (1911) of the United Kingdom (made applicable to Israel by an Order), the Copyright Ordinance (1924), and the Performers and Broadcaster Rights Law (1984) providing neighboring rights to performers and broadcasters (and limited rights to an employer of a performer).⁷ The present regime provides a relatively sound basis for copyright protection in all works (including sound recordings).⁸ The various laws have been amended a number of times over the years.⁹ Nonetheless, there are a few TRIPS

² The methodology used by IIPA member associations to calculate these estimated piracy levels and losses is described in IIPA's 2006 Special 301 submission at www.iipa.com/pdf/2006spec301methodology.pdf.

³ BSA's 2005 statistics are preliminary. They represent the U.S. publishers' share of software piracy losses in Israel, and follow the methodology compiled in the Second Annual BSA/IDC Global Software Piracy Study (May 2005), available at <http://www.bsa.org/globalstudy/>. These figures cover, in addition to business applications software, computer applications such as operating systems, consumer applications such as PC gaming, personal finance, and reference software. BSA's 2004 piracy statistics were preliminary at the time of IIPA's February 11, 2005 Special 301 filing; the 2004 data has been revised and is reflected above.

⁴ MPAA's trade losses and piracy levels for 2005 are available for a limited number of countries and are based on a methodology that analyzes physical or "hard" goods and Internet piracy. For a description of the new methodology, please see Appendix B of this report. As loss numbers and piracy levels become available for additional countries at a later time, they will be posted on the IIPA website, <http://www.iipa.com>.

⁵ ESA's reported dollar figures reflect the value of pirate product present in the marketplace as distinguished from definitive industry "losses." The methodology used by the ESA is further described in Appendix B of this report. In 2005, cooperation between the Customs authorities and entertainment software publishers was good, resulting in seizures of pirated video games on optical disc, particularly shipments from Ukraine. One ESA member company reports that Israeli Customs seized several shipments of pirated entertainment software on optical media being imported into the country from Ukraine; the pirates use false documentation to import pirated products into the country. A seizure action dating back to 2004 is still pending against one Ukrainian importer. Internet piracy is increasing as broadband penetration also increases. Notwithstanding good cooperation with border authorities, piracy at retail remains problematic as does the lack of deterrent penalties being meted out by judges.

⁶ Total losses due to piracy of records & music, business software, and books remained roughly the same, from \$65 million in 2004 to \$61.9 million in 2005.

⁷ Other ancillary legislation includes the Copyright Order (Berne Convention) (1953) (as amended through 1981), which implemented the provisions of the Berne Convention (Brussels Act [1948] text) in Israel, and the Copyright Order (Universal Copyright Convention) (1955), which implemented the UCC in Israel. The Copyright Ordinance was last amended through passage in 2002 of the Act for the Amendment of the Copyright Ordinance (No. 8), 5762-2002 (effective November 3, 2002).

⁸ Detailed discussion of the merits and deficiencies of the current legal regime has been included in prior reports, and can be found at <http://www.iipa.com/rbc/2003/2003SPEC301ISRAEL.pdf>, at 148-152.

⁹ The Knesset passed a Bill for the Amendment of the Copyright Ordinance (No. 8), 5762- 2002 (effective November 3, 2002), strengthening criminal liability in a number of ways. For example, the law increases the maximum prison sentences to five years for certain offenses ("making of infringing copies for commercial purposes" or "import of infringing copies for commercial purposes") and up to three years for other offenses ("the sale, rental or distribution of infringing copies not as a business but in a commercial volume" and the "holding an infringing copy in order to trade

deficiencies in practice, including the unavailability in practice of adequate civil damages, and the inadequacy of the statutory damages system as a substitute.¹⁰

Copyright Bill – 2005: The “Copyright Bill – 2005” (published by the Government of Israel on July 20, 2005), which was reportedly passed by the Knesset on first reading, apparently aims to modernize Israel’s protection of copyright, and to implement the key international agreements with respect to copyright, including the Berne Convention,¹¹ which is incorporated into the WTO TRIPS Agreement,¹² as well as aiming to adhere to Israel’s current bilateral obligations.¹³ The Draft also included at least some issues addressed in the WIPO “Internet” Treaties, the WCT and WPPT.¹⁴ We obtained an unofficial translation of the draft Bill that was published by the Government and have provided comments to the Knesset Economics Committee.

Summary of Comments: IIPA highlights directly below several areas where the draft would result in weakening of protection (e.g., with respect to phonograms), or in violations of Israel’s international and/or bilateral commitments, and other areas which should be but are not covered in this draft (e.g., protection of “technological protection measures” used by creators to protect their creations).¹⁵

- By proposing Section 10 on “mutuality” (material reciprocity), the Draft could, if passed without change and if implemented through an Order, result in an **abrogation of Israel’s TRIPS obligations** to provide national treatment for works. We assume that this is not the intent of retaining this provision (from the old U.K. statute), but TRIPS-compatible national treatment for works should be confirmed.
- The application of “material reciprocity” would mean that foreign sound recordings would lose important rights provided under the current law, and would **violate Israel’s bilateral commitments to protect U.S. sound recordings on the basis of national treatment.**
- Draft Section 45 **fails to provide Berne- or TRIPS-compatible retroactive protection** for works and phonograms.
- The **legal protection of phonogram producers is seriously weakened** under this draft, which is an unwarranted discrimination with respect to other right holders.
- **End-user piracy appears not to be considered a crime** in the Draft.

therein”). The amendment also improves presumptions regarding copyright ownership that apply to both civil and criminal proceedings, although it remains unclear in early 2006 how this provision is being interpreted in practice. The amendment also imposes criminal liability on the officer of a company in which an offense is committed (unless s/he proves s/he did everything possible to prevent the offense from being committed), and doubles fines for copyright offenses committed by companies.

¹⁰ The Supreme Court has ruled that statutory damages are to be ascertained on a per-title basis rather than a per-copy basis, and unlike other jurisdictions, the maximum per-title damage amount is exceedingly low.

¹¹ Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971 (as amended on September 28, 1979).

¹² Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, GATT Doc. MTN/FA II-A1C (1994).

¹³ Bilateral commitments include the U.S.-Israel bilateral copyright agreement reached on May 4, 1950, and consisting of an exchange of notes between U.S. Secretary of State Dean Acheson, and Eliahu Elath, Ambassador of Israel. The Agreement provides assurances from the government of Israel that “all literary and artistic works published in the United States are accorded the same treatment as works published in Israel, including mechanical reproductions of musical compositions.”

¹⁴ See WIPO documents CRNR/DC/94 (the WIPO Copyright Treaty, or WCT) and 95 (the WIPO Performances and Phonograms Treaty, or WPPT), and, for the agreed statements concerning the treaties, see WIPO documents CRNR/DC/96 and 97.

¹⁵ There are also many positive aspects of the Bill, and we do not list those aspects here.

- The Draft appears to **require proof of “trading purpose”** or an actual sale for all criminal violations, which **would not satisfy Israel’s TRIPS obligation** to criminalize piracy on a commercial scale.
- There are **no provisions to protect against circumvention of technological protection measures (TPMs)** used by creators to protect their works from unauthorized copying/use of exclusive rights or from unauthorized access, or against trafficking in circumvention devices/providing circumvention services. Israel should **implement this key WIPO Treaties requirement** (as nearly 90 countries have now done) and join the WIPO Treaties.
- The **publication right appears to provide a WIPO Treaties-compatible** interactive digital right, but the scope of that right should be confirmed.
- **The reproduction right** in the Draft, read with the exception in Section 26 for certain indispensable transient reproductions, **appears to protect temporary copies**, as the drafters apparently intend to do, but does not do so explicitly. This can be accomplished with minor changes to the draft.
- Since **no automatic or express point of attachment** for foreign creations (including phonograms) is provided in the law in accordance with Section 9, an appropriate **“Order” must be issued** referring to, e.g., the Berne Convention, TRIPS Agreement and other bilateral and international agreements to which Israel is a party, before the transition period for the Draft has elapsed in order to ensure that there is no lapse in continuous protection.
- The **Draft’s rental right** in Section 11(7) as modified by Section 17 **violates TRIPS** and must be fixed.
- Several **exceptions to protection run afoul of the Berne Convention and the TRIPS Agreement**. There are concerns with Israel’s proposed adoption of the four “fair use” factors from U.S. law, with the possible overbreadth of exceptions as to computer programs, temporary copies, public performances, and libraries/archives.
- The definition of “infringing copy” in Section 1 would **exclude from protection** any import for which distribution in Israel is not authorized, i.e., so-called **“parallel imports.”**
- **Term of protection for phonograms should be extended** to the same level as for other creations.

Detailed Comments: For reference and for the public record, IIPA makes the following comments on Copyright Bill – 2005:

National Treatment Can Be Denied Under Draft: Section 10 of the Draft proposes,

The minister is allowed, upon the approval of the government, if discovered that a certain country does not grant proper protection to creations of a creator who is an Israeli national, to restrict by order the rights prescribed by this law, wholly or partly, in relation to creations of creators who are nationals of that country; had the Minister prescribed so, the order shall be valid as to creations created after its entering into validity.

This provision permits the minister to deny rights to foreign right holders that are provided to Israeli nationals, if the foreign right holders’ countries deny such rights to Israeli nationals – so called “material reciprocity.” Imposition of material reciprocity would violate the principal of “national treatment” whereby countries treat foreign and domestic right holders alike. National treatment is a core principle of the TRIPS Agreement (Article 3) (as well as the Berne Convention), and by passing Section 10, Israel would put itself in a position of violating TRIPS (and Berne) if it ever issued such an order. Foreign copyright owners would be negatively prejudiced by such a change, and foreign right holders may have no recourse but to seek an

international remedy under TRIPS if Israel effectuates such a drastic change. Section 10 of the Draft should be deleted and the principle of national treatment should be applied to all subject matter; at least, the Israeli government should acknowledge that its treaty (multilateral and bilateral) obligations are controlling, and that the government will therefore never apply (i.e., never issue an order to apply) material reciprocity to copyright protected works subject to treaty obligations.

Application of “Material Reciprocity”: Section 8(c) and 10 also could violate Israel’s commitments as to sound recordings. Under the 1911 U.K. Act, adopted by the Order, 1924, as amended, in Israel, Israel has long protected sound recordings as if they were “musical compositions,” i.e., as “works.” Up until now, Israeli sound recordings and foreign sound recordings received equal treatment (“national treatment”) in Israel, and also received the same treatment as other works, including the full panoply of exclusive rights, which include public performance and broadcasting. Section 10 would allow Israel to single out those foreign countries which do not provide such exclusivity, and deny these important rights to legitimate right owners in sound recordings solely on the basis of their nationality. In other words, while Israeli right holders would receive full rights, foreign right holders could be discriminated against. Discrimination through the application of “material reciprocity” is exacerbated by the fact that the copyright point of attachment is not even apparently provided for foreign sound recordings except as to the rights of reproduction, making available and rental. See Draft Section 8(c), which in effect provides that only phonograms created by Israelis enjoy the full set of exclusive rights. Other phonograms are protected if they were first or simultaneously published in the territory of Israel, but are not granted the important exclusive rights of broadcasting and public performance.¹⁶ Such discrimination is unprecedented in Israel’s copyright history and, at least with respect to U.S. sound recordings, violates Israel’s legal obligations.

Israel’s obligation to afford full national treatment to sound recordings was established by the 1950 U.S.-Israel Bilateral Copyright Agreement. That Agreement, reached on May 4, 1950, consisted of an exchange of notes between U.S. Secretary of State Dean Acheson and Eliahu Elath, Ambassador of Israel, providing assurances from the government of Israel that “all literary and artistic works published in the United States are accorded the same treatment as works published in Israel, including mechanical reproductions of musical compositions.” Works “published in Israel” receive full rights, including public performance and broadcasting, and works includes sound recordings in Israel to the present day, thus, sound recordings first published in the United States or in Israel must receive the same exclusive rights.

The requirement for Israel to provide equal treatment in Israel for U.S. sound recordings as for Israeli sound recordings was confirmed in Israel in 2004, through an important court decision (the April 30, 2004 decision of the Restraints-of-Trade Tribunal in Jerusalem in the matter of IFPI-Israel) and another exchange of letters between the United States and Israel. The court, notwithstanding the Israeli Ministry of Justice’s proffered opinion that U.S. sound recordings are not protected in Israel, decided in favor of IFPI-Israel, and confirmed copyright

¹⁶ While Section 9 provides that the government of Israel may achieve point of attachment through an Order granting protection to right holders from countries belonging to international treaties to which Israel is a party, no such Order has apparently been issued, and implementing regulations with regard to Israel’s accession to the Rome Convention in 2002 indicate, in Section 3, that protection is provided to “phonograms the producer of which ... is a national of a Member State or (the phonogram) was first published in a member state – in respect of reproduction [or] is a national of a Member State that grants similar rights to Israeli phonogram producers or Israeli performers and listed in the appendix – in respect of the direct use for broadcasting and public performance.” Thus, the intent is clear to discriminate against foreign right holders in sound recordings.

protection for U.S. and other foreign phonograms, as well as the application of the 30-day simultaneous publication principle. The judge specifically held that the U.S.-Israel Bilateral obligates Israel to provide national treatment to U.S. sound recordings (it was a given and not in dispute that Israel must provide national treatment for works).¹⁷ The Court stated: “we are of the opinion that sound recordings originating in the United States are protected against public performance in Israel.”

In late 2004, the United States Trade Representative exchanged letters with the government of Israel, in which the Israeli government confirmed that it had instructed the Ministry of Justice staff to follow the court’s interpretation of the 1950 Bilateral Agreement, namely, that Israel will continue providing national treatment for U.S. right holders in sound recordings. The government should now issue in writing an assurance that the meaning of its commitment is that material reciprocity will never be applied in Israel. As noted, we recommend that Section 8c be amended so as to grant all foreign phonogram producers the full set of rights granted to Israeli nationals and section 10 be deleted and that the principle of national treatment be applied as to all subject matter.¹⁸

Retroactivity and Rule of the Shorter Term (Draft Section 45): Draft Section 45 intends to impose a rule of the shorter term on works/phonograms, but apparently misapplies this rule in a way that violates Israel’s obligations under Article 7(8) and 18 of the Berne Convention. Namely, Draft Section 45 provides, “The period of a creation copyright as detailed shall not be longer than the period of copyright that this creation has in its original country.” Article 18 of the Berne Convention requires that Israel protect “all works, which, at the moment of [the Berne Convention] coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.” It is well understood that this requires Israel to protect U.S. works, including those that may have fallen into the public domain due to failure to comply with a Berne-prohibited formality, or which never had a term of protection due to failure to comply with a formality. The rule of the shorter term allows that the “term shall not exceed the term fixed in the country of origin,” not the term that the creation “has” as in the Israeli provision. It is well understood that the “term fixed” means the term the work would have enjoyed had all formalities been complied with. Thus, Israel’s Draft Section 45 is revealed to be deficient as compared with the Berne Convention and TRIPS, since there may be works or phonograms which fell into the public domain in the United States due to failure to comply with a formality, but which under the Berne Article 18 retroactivity principle, must be protected in Israel. Draft Section 45 must be amended to ensure that it meets its international obligations.

Weakening of Protection for Phonograms: Whereas under the previous legal regime, phonograms were regarded as works, and thus entitled (with the limitation for mechanical reproductions) to all the exclusive rights of other works (e.g., the right to “produce, reproduce, perform ... the work”), under the Draft, phonograms are granted substantially more limited

¹⁷ The Court quoted more of the 1950 exchange of letters between the Israeli Ambassador in Washington and the U.S. Secretary of State in May 1950, as follows:

With a view to clarifying the benefits in Israel of authors and proprietors in the United States of America since May 15, 1948, my Government has instructed me to state its assurances that under the provisions of the Israeli law all literary and artistic works published in the United States are accorded the same treatment as works published in Israel, *including mechanical reproductions of musical compositions*, and that citizens of the United States are entitled to obtain copyright for their works in Israel on substantially the same basis as the citizens of Israel, including rights similar to those provided by section 1(e) of the aforesaid title 17. [emphasis added]

¹⁸ We note that to comply with the 1950 Bilateral Agreement, Israel must at least protect U.S. sound recordings based on the principle of national treatment

rights. Thus, phonogram producers receive financial rights in the phonograms, but these rights are limited, e.g., the public performance right and broadcast right is limited to “commercial” phonograms, meaning phonograms “published for commercial purposes.” The changes result in an overall weakening of protection; the Israeli government should not permit such a weakening to occur. Draft Section 4 further confirms this downscaled treatment for phonograms in the Draft, ending over half a century of equal treatment, and denying right holders in phonograms rights they previously held.

IIPA hereby expresses its deep objections to the language in the “explanation” to Section 4 which states in pertinent part:

In the final section of sub-clause (a)(2) it is proposed to determine that the phonograms be protected as a different type of creation, to distinguish from the situation today, when records are protected by copyright as though musical creations (see clause 19(1) of 1911-Law). This separate classification is justified by the fact that records are *administered by rules different from the rules applied on other protected creations in the international marketplace*, and same regards the proposed law as to the kind of rights *and the period of the copyright*. Also, differently from other protected creations, *a record may not be "original" as it is prevalent in other countries*. [emphasis added]

This statement reveals the extreme prejudices and biases of the drafters against protection of sound recordings, and the emphasized portions of the above in fact belie the current commercial realities. First of all, in at least 20 countries today, including in the United States, phonograms are administered by the same rules from those applied to ‘other protected creations in the international marketplace’; the catalog of produced and recorded music would be far smaller if these countries did not protect sound recordings as they do other works. Also, there is no reason to discriminate regarding the term of protection for phonograms. Phonograms are protected for greater than 50 years in at least 17 countries around the world, and the number providing increased terms is growing each year. As artists’ local catalogues get older, and with increased life expectancies, governments recognize that increasing the term of protection is a chief way to ensure creators properly can reap the benefit from their phonograms. Again, the proposed weakening belies the tradition in Israel of protecting phonograms as though they were musical works.

Still No Clear Coverage of End-User Piracy as a Crime: The unauthorized use of business software and other copyright materials in a commercial setting causes grave harm to legitimate right holders. To the extent that such illegal uses result in significant unjust enrichment (i.e., on a commercial scale), such activities must be criminalized in order to meet the TRIPS Article 61 requirement to criminalize piracy on a commercial scale. Unfortunately, while the Israeli government has considered this issue for many years, with some within the government advocating criminalizing end-user piracy, the Draft apparently fails to do so. Section 50 dealing with “indirect” civil infringements does make it illegal to “hold” (possess) for “commercial purposes” which we believe may cover many end-user situations. However, Section 63 dealing with criminal infringements only covers “Holding a infringing copy of a creation, in order to trade it.” Since end-user piracy does not normally involve a “trade” (monetary exchange), it appears this form of piracy is left out of the criminal statute, in violation of TRIPS.¹⁹

¹⁹ A more detailed discussion of the lack of a criminal remedy against end-user piracy is in the 2003 Special 301 report for Israel, at <http://www.iipa.com/rbc/2003/2003SPEC301ISRAEL.pdf>, at 148-149.

Other Criminal Offenses Limited by Necessity to Prove “Trading Purpose”: A major shortcoming in the Draft’s criminal provisions is the apparent necessity to prove “trading purposes” for criminal liability to attach. Such proof requirements are problematic in the digital environment, and run afoul of Israel’s obligation under TRIPS to criminalize at least piracy on a commercial scale. “Commercial scale” piracy may cause significant “commercial scale” harm to a right holder notwithstanding that there is no purpose to trade in infringing materials. Examples would include uploading pre-release films onto the Internet. Often such actions are undertaken with no “business aim” but cause enormous harm to right holders. Such infringements must be covered notwithstanding that they are not done for a “trading purpose.”

No Provisions to Protect Technological Protection Measures from Circumvention: There are no provisions to protect against circumvention of technological protection measures (TPMs) used by creators to protect their works from unauthorized copying/use of exclusive rights or from unauthorized access, or against trafficking in circumvention devices/providing circumvention services. TPMs are key enabling technologies for healthy electronic commerce, and protection of TPMs is a key feature of the WCT and WPPT.²⁰ Israel should implement this key WIPO Treaties protection (as nearly 90 countries have now done) and join the WIPO Treaties. There are also no provisions dealing with “rights management information” (RMI), which right holders may use to facilitate licensing. RMI protection is another feature of the WCT and WPPT that the government of Israel should take the opportunity presented by the current amendments to implement.

Unclear Whether Draft Affords Broad Communication to the Public Right: Section 11(5) provides the exclusive right of “Publicizing [alternatively translated as ‘provision’] of “Making Available of the creation as stated in paragraph 15 – as to all types of creations.”

²⁰ Below is an example of specific implementation language that we believe adequately addresses the WCT/WPPT requirement on TPMs:

- (1) Any person who
 - (a) knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that (a) controls access to a protected work, or other subject matter, or that (b) restricts the exercise of an exclusive right provided in this Law; or
 - (b) manufactures, imports, exports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components, or offers to the public or provides services, which:
 - (i) are promoted, advertised or marketed for the purpose of circumvention of any effective technological measure, or
 - (ii) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure, or
 - (iii) are primarily designed, produced, adapted, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure;shall be liable, upon the suit of any injured party, to civil relief by way of damages, injunction, accounts or as otherwise provided in this Law. Any person, other than a nonprofit library, archive, or educational institution, that is found to have engaged willfully in such activities and either (a) for purposes of commercial advantage or private financial gain, or (b), in the case of a violation of (1)(b), on a scale which inflicts commercial injury on any party, shall be guilty of a criminal offense as provided in Section 62 of this Law.
- (2) ‘effective technological measure’ means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, or other subject matter, or protects any copyright or any rights related to copyright as provided by this Law.
- (3) The prohibition in this Section prohibits circumvention of technological measures and does not require an affirmative response to such measures. This Section does not require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure. This subsection does not provide a defense to a claim of violation of Section (1), so long as such product does not otherwise violate Section (1).
- (4) A violation of this Section is independent of any infringement that might occur under this Law.

Section 15 provides, “Making available of the creation is the making an act with the creation that allows members of the public to access it at the place and time they choose.” This newly enumerated right apparently does not provide the broad “communication to the public” right of Article 8 of the WCT (i.e., it is only the “making available” right – the interactive right).²¹ The explanation to Section 11(5) states,

This new right, anchored in the proposed provision, is the right for making available of the creation, such as making it available for internet surfers. This right is based on new international conventions (see the Explanation to the proposed paragraph 15), and it is suggested to implement it on all kinds of creations, including records, all above in coordination with this said conventions.

The explanation to Section 15 states,

The right of making available is based on the new conventions of WIPO 1996 – WCT Convention and WIPO Convention on the rights of recording producers and performers WIPO Phonograms and Performances Treaty-WPPT, and its aim is to determine the right which specifically refers to making the creation available to internet surfers.

It appears from the explanations that the drafters intended to cover the broad communication to the public right (by specific reference to the WCT), but that the wording chosen may not be broad enough. It may be that, as an application of what Dr. Mihály Ficsor (former Deputy Director General of the World Intellectual Property Organization – WIPO – who presided over the 1996 Diplomatic Conference which resulted in the conclusion of the WCT and WPPT) has referred to as “the umbrella solution,” Israel intends to come into compliance with WCT Article 8 (and the respective rights afforded in the WPPT) through a combination of the Section 11(5) and 15 right, and the traditional rights of broadcasting and public performance.

Reproduction Right (Temporary Copy Protection): The reproduction right in Paragraph 12(1) along with the exception in Paragraph 26 apparently confirms that Israel protects temporary copies. However, the wording and explanation is awkward and may give rise to confusion. First of all, it is unclear what is meant by “in a tangible way.” The explanatory note indicates this concept may be a crystallization of court cases over the years, and yet, it is unclear whether “in a tangible way” can be reconciled with protecting reproductions “in any manner or form” as required by the Berne Convention and TRIPS. Nonetheless, Paragraph 12(1) seems to answer this question in the affirmative since by its own terms “[s]torage of the creation in an electronic device or any other technological device” is one example of reproductions “in a tangible way.” That phraseology could be improved by making it technology-neutral, as opposed to the phrases “in an electronic device” or “technological device” which may be read or interpreted to limit the scope of reproductions to something less than “in any manner or form.”

The WIPO Copyright Treaty confirmed that the reproduction right should not be limited depending on the duration of a copy. The Agreed Statement concerning Article 1(4) of the WCT (and the comparable provision in the WPPT) states, “[t]he reproduction right, as set out in Article 9 of the Berne Convention ... fully appl[ies] in the digital environment, in particular to the use of

²¹ An alternative translation provided to us translates Section 10(5) as “provision of the work to the public” which is defined in Section 14 as “provision so that individual members of the public shall have access to the work [at] such [a] place and at such time as they may personally choose.”

works [performances and phonograms] in digital form,” and that “storage of a protected work in digital form in an electronic medium constitutes a reproduction...” As WIPO has explained, the agreed statement states the obvious: the concept of reproduction, under Article 9(1) of the Berne Convention, extends to reproduction “in any manner or form”; therefore, a reproduction may not be excluded from the concept of reproduction just because it is in digital form, through storage in electronic memory, nor may it be excluded from the concept of reproduction just because it is of a temporary or transient nature. The Israeli drafters appear to intend the above interpretation, since they intend to meet the requirements of the Berne Convention “in any manner or form,” and since Paragraph 26 draws out an exception for certain indispensable transient reproductions. To better reflect this outcome in the Draft, we believe Paragraph 12 should be amended to read:

12. The duplication of a creation is making a copy of a creation in any ~~concrete~~ way, **directly or indirectly, temporarily or permanently, in whole or in part**, including –

(1) Storage of the creation in an ~~electronic form device or any other technological device~~;

Point of Attachment – Need Issuance of Order to Ensure Protection: Draft Section 9 provides that foreign works/phonograms that do not otherwise qualify for protection (e.g., by first publication in Israel) will be protected on the basis of international treaties pursuant to a Ministry of Justice “order.” Since, therefore, this confirms that there is no express point of attachment for foreign creations provided in the Draft, an appropriate “Order” would have to be issued referring to the Berne Convention, TRIPS Agreement and other bilateral and international agreements, before the transition period for the Draft has elapsed in order to ensure continuous protection. Preferably, the Draft should be amended to expressly provide a point of attachment, such as:

The provisions of this Law shall also apply to works, phonograms that are eligible for protection in Israel by virtue of and in accordance with any international convention or other bilateral or international agreement to which Israel is party.

Draft Rental Right Violates TRIPS: The Draft rental right in Section 11(7) as modified by Section 17 violates TRIPS and must be fixed. First, Article 11 of TRIPS refers to the rental of “originals or copies” of their works (applied *mutatis mutandis* to sound recordings in Article 14.4 of TRIPS). Section 17(1) of the Draft only refers to copies and must be amended. Second, and more importantly, Section 17(b), which exempts from copyright protection renting out creations by “a public library or a library of an educational institute,” apparently does not carve out computer programs and phonograms. To the extent that computer programs and phonograms are subject to the Section 17(b) exclusion, the provision probably violates TRIPS; rental even under the terms of Section 17(b) would certainly impinge on the exclusive right, would conflict with a normal exploitation of the work and would unreasonably prejudice the legitimate interests of the right holder. Other laws contain minor allowances of lending a computer program for a nonprofit purpose by a nonprofit library, but only on condition that the library affix a notice regarding the rights involved to the package.

Exceptions: In light of the long list of exceptions, it is essential that the law implement expressly the well established Berne “three-part test” (incorporated into TRIPS), preferably by adding the test in Section 18 and making it applicable to Sections 19-32. In other words, it should be codified in Section 18 that no exception in Israel’s law (whether fair dealing, “fair use,” or a specific exception) may be applied: in other than special cases; in a way that conflicts with a normal exploitation of the work; or in a way that unreasonably prejudices the legitimate

interests of the right holder. Such a provision would provide needed guidance to the courts that they must respect international norms in their interpretation of fair dealing (and other exceptions). We note that some of the exceptions listed in Sections 19-32 of the Draft run afoul of the Berne three-part test, especially if applied in the digital environment. We note the following as among the specific problems/issues that must be addressed in the exceptions sections:

- **Proposed Application of U.S.-Type “Fair Use” Factors (Draft Section 18(b)):** At the outset, we note that Section 19(a) attempts to adopt the U.S. “fair use” test by stating that “fair dealing with the creation is allowed, among others, for the following purposes: self study, research...”. Section 19(b) includes a list of factors that are similar to those in place in the United States and the explanatory notes clarify the intention to enact a non-exhaustive list of purposes, which would allow enough flexibility to the courts in determining whether a particular use is “fair.” We are very concerned that the result of this change is that considerable case law interpretation in Israel on “fair dealing” may be thrown out in favor of as yet undeveloped factors in Section 19(b). By contrast, in markets like the U.S., which employ very similar factors to those set out in proposed Section 19(b), many years of jurisprudence have provided society with considerable clarity on the boundaries of “fair use.” There is a significant risk that in Israel the adoption of these factors at this time might be viewed by the community as a free ticket to copy. This would have disastrous consequences, and thus we urge the Israeli Government to re-examine whether it is wise to introduce these factors, rather than relying on Section 19(a), which sets out the long-established “fair dealing” principle, followed by specific exceptions dealing with certain special cases (Sections 19-32, but see comments below). Finally, if the factors in Section 18(b) are to be ultimately adopted, Section 19(b)(1) especially needs to be amended to properly narrow the scope of the “fair use” inquiry:

(b) In order to examine the fairness of a use of the creation for the purposes of this paragraph, the following shall be considered:

(1) The aim of the use and its type, ***including whether the use is of a commercial nature or is for non-profit educational purposes;***

- **Computer Program Exceptions (Backup and Interoperability) (Draft Section 24):** The current Draft exceptions as to computer programs run afoul of international standards and must be more narrowly tailored. First, Section 24(a) must be limited to a single copy for backup purposes. Section 24(b) appears to allow for reproduction or adaptation for purposes that go beyond interoperability, and do not contain the safeguards to ensure that the copy being made is not otherwise available, is limited to the portion of the work needed for purposes of achieving interoperability, etc. The explanation of Section 24(b) is not that helpful, as it simply states that its purpose is in part to allow “using computer software to develop new programs as well as more effective use of the subsisting programs.” Assuming the purpose is to enact a provision that allows lawful users to achieve interoperability, but keeping in mind the three-part test for exceptions, the vague language used in the current Draft exception must be narrowed to comport with international standards. *Cf.* European Directive on the Legal Protection of Computer Programs,²² Articles 5 and 6. We propose that Section 24(b) of the Draft be changed as follows:

²² 31991L0250 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.

(b) The duplication of computer software or the making a derived creation is allowed when a person has a licensed copy of the computer software, to these purposes, and to the extent needed for [these] purposes:

(1) **use of the computer program by the lawful acquirer in accordance with its intended purpose, including for ~~C~~correcting errors in the computer software;**

(2) ~~or~~ **obtaining the information necessary for fitting it to an independently created computer program with other programs, provided that the following conditions are met:** ~~the computer system or other computer systems or other computer software, for usage purposes;~~

(a) these acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorized to do so;

(b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in subparagraph (a); and

(c) these acts are confined to the parts of the original program which are necessary to achieve interoperability.

~~(2) Fitting a computer system or other software to enable the creation by use of said computer software.~~

(3) **The provisions of paragraph 24(b)(2) shall not permit the information obtained through its application:**

(a) to be used for goals other than to achieve the interoperability of the independently created computer program;

(b) to be given to others, except when necessary for the interoperability of the independently created computer program; or

(c) to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.

- **Temporary Copy Exception (Section 26):** As noted above, Sections 11(1), 12, and the exception in Section 26 confirm that the drafters intend that there be protection for temporary copies in Israel. We have suggested above how the drafters can expressly provide for this in Section 12. The Draft exception language is vague enough to cause great concern, e.g., “for other legal use of the creation” is overly broad, and this language must be narrowed in order to meet the Berne and TRIPS standards. We also suggest other changes which are needed to ensure that the exception for certain temporary reproductions comports with the Berne Convention’s well established three-part test as follows:

26. A temporary duplication of a creation **is allowed if it:**

(a), is merely incidental, and as an integral part of a technological process aiming only to allow the transmission of the creation between the sides in a communication network by a mediator, or is a temporary duplication of a creation that is within an operation that makes a digitally stored ~~for~~ ~~other~~ legal copy of a work accessible; and

(b) the reproduction use of the creation is made by a person allowed authorized by the right holder or by law; and

(c) the reproduction is undertaken within an incidental, technologically inevitable step for performing an authorized act consequential to the transmission or to rendering the work accessible, is within the normal operation of the apparatus used, and is carried out in a

manner which ensures that the copy is automatically erased and cannot be retrieved for any purpose other than that provided for in the preceding sub-sections, ~~on condition that the temporary copy does not have an pecuniary value in itself.~~

- **Inappropriate Expansion of Artistic Work Exception (Draft Section 27):** Draft Section 27 as currently crafted violates Berne and TRIPS. The explanation describes this Section as adopting from the U.K. Act the exception in Section 2(1)(ii) of that Act whereby a visual artist could re-use a mold, so long as the “main design” of the work was not repeated or imitated. In this case, Paragraph 27 refers to not repeating the “essence” of a work; essentially, this invites the author of any work (including sound recording) to create adaptations or derivative works, regardless of whether the author has already transferred rights in the work/phonogram. This in essence grants a new moral right to continue to exploit a work, and thus not only impinges upon several exclusive rights, but imposes a severe restriction on the ability to freely contract. This Section must be curtailed to the original purpose of the U.K. Act or deleted.
- **Public Performance Exception (Section 29):** Draft Section 29 creates an exception for certain public performances of plays, but also possible phonograms or motion pictures, mainly in school settings. The exception must be further limited in order to meet international standards; most importantly, it should be limited to a face-to-face educational setting, and to a performance where no profit is made, *cf.* 17 U.S.C. § 110 (U.S. Copyright Act) (“without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if there is no direct or indirect admission charge or if the proceeds are used exclusively for educational purpose and not for private financial gain”). Also, if a copy is involved, the copy used must have been lawfully made.
- **Library/Archive Exception (Draft Section 30):** Draft Section 30 as written fails to meet the Berne/TRIPS standard for exceptions. Section 30(a) must be limited to a single copy, and since the explanation makes clear that this would allow a “digital” copy to be made, the statute must provide assurance that the reproduction in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the physical premises of the library or archives. Otherwise, it violates Berne and TRIPS. Section 30(b) as drafted is too open-ended to comport with international standards. By contrast, 17 U.S.C. § 108(d) and (e) (U.S. Copyright Act) allows for limited inter-library transfer of a single copy of one article from a compilation or periodical, in limited circumstances, or of an entire work, but only where the work cannot be obtained at a fair price. The drafters should reexamine provisions such as Section 108 of the U.S. Copyright Act to ensure that the Berne/TRIPS standard is met in the Israeli draft.

Term of Protection for Audiovisual Works and Sound Recordings: IIPA is heartened that the government of Israel has decided to extend term of protection to “life of the author” plus seventy years. There is no reason to afford shorter protection to the owners of audiovisual works and sound recordings.²³ The international trend is to provide at least seventy

²³ Indeed, since those works are measured from the date of publication (or in the case of “records” from the date it was created) it is even more imperative that, for the sake of providing proper incentives for further creation and dissemination, that an attempt be made to arrive at an equivalent number of years to “life of the author” plus seventy years. In the United States, studies were conducted to arrive at the actuarial equivalent of “life of the author” plus seventy years, which was demonstrated to be ninety-five years from publication.

years for both audiovisual works and sound recordings, and the government of Israel should not do the creators of audiovisual works and sound recordings the extreme disservice of prejudicing them by providing shorter terms.

Parallel Importation: The definition of “infringing copy” in Paragraph 1 would exclude from protection any import for which distribution in Israel is not authorized, i.e., so-called “parallel imports.” Parallel imports of copyright material ultimately harm local distributorships, and increase the likelihood that piratical product will be “mixed” in with shipments of parallel imports, making piracy harder to detect and enforcement more difficult. The government should reconsider.

Civil Remedies (Statutory Damages): Section 58(a) proposes statutory damages in the amount of NIS100,000 (US\$21,277). These statutory damages are awarded at the discretion of the court (“the court is allowed, at the claimant’s request”) rather than at the election of the claimant, which is a major weakness. However, we commend the drafters for increasing the maximum, while noting that abolishing the minimum may make claimants reluctant to request statutory damages. We continue to be concerned that, even with the higher maximum, the failure to consider a “per-copy” damage award decreases the likelihood, especially in a case causing countless infringing copies of numerous titles, that the statute will have a deterrent impact on piracy. Further, Draft Article 60 makes it even more unlikely that civil cases can ever be deterrent in Israel, since no compensation will be awarded when “the offender did not know or could not have known, at the time of the violation, that there is a copyright on the creation.”

Destruction/Forfeiture Not Adequately Provided (Draft Section 62): Draft Section 62 provides for the possibility of destruction of infringing goods, but also gives courts the ability to order the “transfer of the ownership of the infringing copies to the claimant, if he had asked for, in exchange of payment their value as if the copyright was not breached or in exchange of any other payment as the court shall see fit.” The explanation given as to why this latter provision is necessary is that “the ownership of infringing copies by the claimant might be unreasonable, especially when the infringing copies, being physical objects, have a pecuniary value much higher than what is implied from the violation of the creation copyright (for example, the copy of a sculpture poured in gold, the pecuniary value of the raw material might be higher or equal to the pecuniary value of the creation).” This example seems far-fetched, and it is highly unfair to force right holders in mass-market copyright materials to pay the infringer’s costs for the infringement, e.g., for the polycarbonate used to make the pirate CDs and the glass or metal used to make the masters of the disc. This provision violates Article 46 of TRIPS which mandates the disposal of infringing goods “without compensation of any sort.”

Ex Parte Civil Searches (Violations of TRIPS): In accordance with the TRIPS Agreement, Israel must provide for search orders to be available even without the presence of the defendant. This is not provided in the Draft.

Injunctive Relief: Nowhere in the draft is injunctive relief provided for.